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OCTOBER TERM, 1982.

NORFOLK REDEVELOPMENT AND HOUSING AUTHORITY, A POLITICAL SUBDIVISION OF THE COMMONWEALTH OF VIRGINIA,
PETITIONER-DEFENDANT,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,
RESPONDENT-PLAINTIFF.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT.

Brief of the Boston Redevelopment Authority as Amicus Curiae in Support of Petitioner.

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BRIEF OF THE BOSTON REDEVELOPMENT AUTHORITY AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The Boston Redevelopment Authority ("BRA")[1] respectfully submits this brief as amicus curiae in support of the position of the Norfolk Redevelopment and Housing Authority ("NRHA") and in order to bring to the Court's attention the interests of the BRA and of the public. The Fourth Circuit's decision, if affirmed, will adversely affect redevelopment not only in the Commonwealth of Massachusetts but also throughout other parts of the United States.

The BRA is charged with responsibilities very similar to those of the NRHA and other

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1. The BRA is a "public body politic and corporate" of the Commonwealth of Massachusetts (the "Commonwealth"), Mass. Gen. Laws Ann. Ch. 121B, §4 (West Supp. 1981). This brief is submitted pursuant to Supreme Court Rule 36.4.

housing and redevelopment authorities.[2] Since the passage of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§4601 et seq. (1976) (the "Uniform Relocation Act"), the BRA has undertaken a number of significant urban renewal projects in conjunction with the United States Department of Housing and Urban Development ("HUD"). Those projects were undertaken and funded on the express understanding and long standing practice of HUD that participation in federal funding would not jeopardize state regulation of public utilities. Such regulation is in

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2. The BRA is responsible within the City of Boston for the acquisition, clearance and assembly of land and improvements within decadent, substandard and blighted open areas and for preventing the spread of blight and deterioration in such areas through the carrying out of urban renewal projects. Mass. Gen. Laws Ann. Ch. 121B, §§1 and 4 (West Supp. 1981).

part an outgrowth of a rule of common law more than a century old. This rule provides that in return for the right to install its facilities under public streets at no charge, a public utility most upon request of the City remove its facilities at its own expense. Boston Electric Light Co. v. Boston Terminal Co., 184 Mass. 566, 69 N.E. 346 (1904); New England Telephone & Telegraph Co. v. Boston Terminal Co., 182 Mass. 397, 65 N.E. 835 (1903). This rule has been further implemented by contracts with public utilities in the form of licenses granted by municipalities. These licenses by their terms require a utility to bear relocation costs. In the case sub judice, the franchise agreement provided that the public utility "was obligated, upon request of the City, to abandon or remove ... [distribution facilities] without charge." Petitioner's Brief for Writ of Certiorari at 7. And, to the

extent a utility receives compensation for this basic responsibility, it does so through the rate structure established by state regulatory commissions[3] such as in Massachusetts the Department of Public Utilities.

In short, regulation of public utility rates has always been a matter of state concern; it has been HUD's long standing policy not to interpret the Uniform Relocation Act ("URA") so as to trench upon this basic state prerogative. Thus, HUD rejected C & P's claim based upon the purpose

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3. In the instant case, this was stipulated to below. Stipulation 11 states:

> "When in the course of its normal business practices C & P has relocated its facilities from the right-of-way of public streets upon the direction of the City of Norfolk, the cost of such relocation like any other expense has been borne by C & P as part of its operating expenses within the rate structure of the State Corporation Commission."

of the Uniform Relocation Act and HUD's stated policy (Emphasis added):

> The persons ... presently defined as displaced persons in HUD programs did not include the conduits, lines, etc., of utility companies. The HUD Urban Renewal Handbook, RHA 7209.1, chapter 2, p. 4, stated:
>
> > Removal or relocation of utility lines owned by a private utility company will not be allowed as a project expenditure unless compensation to the company is required under applicable State statutes, judicial decisions, or pre-existing local ordinances or provisions of the company's franchise.

In reliance upon this well established rule, the BRA embarked upon numerous federally assisted projects, budgeted such projects so as to exclude such relocation costs, and consummated financial settlements on those projects with HUD. Under the BRA's typical federal assistance "loan and grant" contract with HUD, relocation costs are to be reimbursed by HUD. However, HUD's obligation

to reimburse such costs is generally terminated by the final settlement agreement for each project.[4]

Approximately twenty final settlements have been made in connection with BRA projects. In each of these projects, no relocation costs were paid to public utilities and no funds were reserved for such expenses. If the Fourth Circuit's ruling is affirmed, utilities will now request reimbursement for relocation costs on these projects and others throughout the United

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4. Attached as an appendix to this brief is the text of a typical financial settlement or "close out" agreement. Paragraph D thereof provides:

> Any costs or obligations incurred in connection with the project with respect to claims which are disputed, contingent, unliquidated or unidentified and for the payment of which insufficient project funds have been reserved by the financial settlement, shall be borne by the City.

States even though such costs were incurred without expectation of compensation and have already been included in the utilities' rate base.[5]

The impact of such a result on the financial integrity of the BRA and on urban renewal is substantial. The practical effect is to create a large, unexpected windfall for public utilities. For redevelopment authorities, such as the BRA, such a result spells disaster. On projects for which financial settlements have been concluded, public utilities will look to the BRA for payment of relocation costs. The costs claimed by C & P

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5. As pointed out in the BRA's amicus brief in support of the NRHA's petition for a writ of certiorari, based upon the Fourth Circuit's decision, public utilities have refused to proceed with relocation of services for urban renewal projects unless paid relocation benefits.

in the case at bar were approximately $700,000. Using that figure as an approximation and multiplied twenty times, the BRA alone may face claims of fourteen million dollars. No funds have been appropriated to cover such unforeseeable claims. If such claims are in fact made, they will quickly exhaust existing funds and jeopardize the financialvitality of redevelopment authorities. Even if HUD pays such costs notwithstanding the financial settlements, it is obvious that there will be significantly less money available for urban revitalization, to the detriment of all.

The Fourth Circuit's decision shatters the bedrock of federalism. It abrogates local regulation that has, as a matter of common law, of contract and of state regulation, for over a century required public utilities to relocate without direct compensation. The ruling of the Fourth

Circuit comes without any precursor and, indeed, is contrary to HUD's long standing policy to exclude such costs from relocation benefits. It thus flies in the face of redevelopment authorities' reliance upon both state and federal law in entering into and closing out federally assisted projects. If the Fourth Circuit's decision is applied retroactively, basic constitutional tenets will be abridged. For these reasons, and in furtherance of the BRA's interest, the public interest, and the preservation of federalism, the BRA submits the arguments below.

SUMMARY OF ARGUMENT

The Uniform Relocation Act was enacted to provide supplemental benefits for displaced persons who had suffered a taking and were disproportionately injured thereby. Utility companies do not come within the ambit of the Act. As part of state regulation and as a matter of contract, utility

companies have agreed to relocate or abandon their distribution facilities at their own expense. There is therefore no compensable taking for their property. Utility companies also suffer no injury since they are merely complying with their contractual commitments and, in any event, have already been compensated in their rate base.

Legislative history shows that Congress enacted the Uniform Relocation Act with the federal highway and urban renewal programs in mind and with an intention to create a uniform system. Neither of these systems created a federal right to compensation for utility companies. Thus, Congress must not have intended to extend relocation compensation to utility companies under the Uniform Relocation Act.

Regulation of utility companies has been a traditional area of state regulation. The Uniform Relocation Act enacted a plan of

voluntary, not coercive, compliance to qualify for federal assistance. In reliance upon HUD's policy not to provide relocation benefits contrary to state regulation of utilities, state agencies entered into and settled federally assisted redevelopment projects. Absent a clear statement of Congressional intent to the contrary, it is improper to continue the Act as altering such established relationships without abridging the Tenth Amendment and the Contract Clause.

ARGUMENT

I. THE STATUTORY PHRASE "DISPLACED PERSON" DOES NOT INCLUDE UTILITY COMPANIES THAT RELOCATE AT THE REQUEST OF STATE AUTHORITIES.

A. Utility Companies Are Not Displaced Persons under the Uniform Relocation Act Because They Suffer No Taking.

The legislative history of the Uniform Relocation Act of 1970, 42 U.S.C. 4601 et seq. (1976), indicates that the Act was intended not to provide payments to all who

are inconvenienced by a redevelopment project, but rather primarily to provide supplemental benefits to those whose property is taken.[6] The Senate Report that accompanied the Uniform Relocation Act stated that the Act "is designed to permit the Federal government to deal consistently and fairly with all those whose property is taken for public projects...." Sen. Rep. No. 488; 91st Cong., 1st Sess. (1970). In discussing the

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6. Certain sections in the Uniform Relocation Act provide benefits when no taking has occurred. See, e.g., 42 U.S.C. §4624 (1976) (relocation benefits to tenants); 42 U.S.C. §4637 (1976) (persons displaced by certain housing projects considered displaced persons despite the absence of a taking). The fact that Congress felt compelled to deal specifically with these exceptions indicates that the general provisions of the Uniform Relocation Act provide benefits only where property is taken. See Note, Displaced Persons and the Uniform Relocation Act: A Proposed Methodology for Awarding Benefits, 58 B.U.L. Rev. 596, 619 n. 156 (1978).

the Uniform Relocation Act, Senator Mundt, one of its sponsors, stated:

> Our Constitution provides that when property is taken for a public purpose that owner will receive just compensation. However, when the fair price is paid for the property it does not provide for expenses that are incurred by the owner for being disrupted and in seeking a new location for his home or business. This bill would seek to compensate for these expenses....

115 Cong. Rec. 31534 (1969).

The Uniform Relocation Act therefore provides supplemental benefits to mitigate the hardship of traditional compensation under eminent domain under which an owner is compensated only for the value of the property taken. In light of its legislative history, one commentator has concluded that the statutory phrase, "displaced person", 42 U.S.C. §4601(6)(1976), should be interpreted so as to allow compensation only where there has been a taking. Note, Displaced Persons

and the Uniform Relocation Act: A Proposed Methodology for Awarding Benefits, 58 B.U.L. Rev. 596, 619 (1978) (hereinafter "Displaced Persons"). Thus, except for persons, such as tenants, for whom benefits are specifically provided by the Act, 42 U.S.C. §4624 (1976), it is a compensable taking which triggers the right to supplemental or relocation benefits. Since no property of a utility company is taken when its facilities are removed from under city streets, the utility does not fall within the statutory definition of displaced person.

A utility company, however, suffers no taking under the Uniform Relocation Act for two reasons. First, the government does not acquire a proprietary interest owned by the utility. Utility companies install their facilities under city streets subject to the above stated common law rule or pursuant to licensing agreements with municipalities.

The prevailing view in most jurisdictions is that the right granted by such licenses does not create a compensable property interest in the hands of the utility. Artesian Water Co. v. State, Department of Highways and Transportation, 330 A.2d 432, 440 (Sup. Ct. Del. 1974); New England Telephone & Telegraph Co. v. Boston Terminal Co., 182 Mass. 397, 399, 65 N.E. 835, 836 (1903). Thus, the utility has no compensable interest.

Second, although the actual facilities that are affected may qualify as personal property of the utility company, Natick Gas Light Co. v. Natick, 175 Mass. 246, 248, 56 N.E. 292, 293 (1900), it is clear that no property interest of a utility company in these facilities is appropriated by the government when the utility is requested to supply new distribution services. The facilities may "no longer [be] useful as originally placed. But [they remain] the

property of the [utility company]." Natick Gas Light Co. v. Natick, 175 Mass. at 248; 56 N.E. at 293.

Absent the acquisition of a property interest of a utility by the government, there is no right to supplemental benefits. By virtue of the consensual licensing arrangement in cases such as the one at bar, a utility can have no such interest.

B. Utility Companies Are Not Displaced Persons Within the Meaning of the Uniform Relocation Act Because They Suffer No Disproportionate Injury.

One of the policies of the Uniform Relocation Act is to compensate those who suffer disproportionate injuries as a result of government programs. The declaration of policy of the Uniform Relocation Act states:

> The purpose of this subchapter is to establish a uniform policy for the fair and equitable treatment of persons displaced as a result of Federal and federally assisted programs in order that such persons shall not suffer

> disproportionate injuries as a result of programs designed for the benefit of the public as a whole.

42 U.S.C. §4621 (1976) (emphasis added).

Again, the phrase "displaced person" should be interpreted in light of this policy, thereby excluding those who do not suffer disproportionate injury. See, Note, Displaced Persons, 58 B.U.L. Rev. at 622-25 (arguing that tenants who are forced to move by a government project at the expiration of their leases should not be entitled to relocation benefits because they suffer no disproportionate injury).

It is obvious that a utility company that relocates facilities installed under public streets suffers no injury, let alone one that is disproportionate. As is explained above, a utility company generally undertakes a contractual obligation to relocate at its own expense facilities

installed under public streets. This contractual obligation is merely a reflection of the common law rule that in return for the right to install facilities under public streets at no charge, a public utility may be required to remove its facilities at its own expense. Boston Electric Light Co. v. Boston Terminal Co., 184 Mass. 566, 69 N.E. 346 (1904); New England Telephone & Telegraph Co. v. Boston Terminal Co., 182 Mass. 397, 65 N.E. 835 (1903). Thus, a utility company cannot claim that relocation costs are a disproportionate injury because it voluntarily has undertaken such obligations.

Utilities that relocate as a result of federal programs do not suffer any real economic injury. Utilities are allowed to install facilities under public streets free of charge. The cost of providing the service and profiting therefrom is the quid pro quo for the free license. When relocation is

necessary, cities normally enter into new licensing arrangements giving utilities free access to land below public streets. Unlike tenants or homeowners who are forced to relocate, utilities do not face the possibility that a new location can be secured only at a higher cost. Moreover, any economic cost that may be incurred by a utility in relocation is normally passed on to the consumer in the form of higher rates. In amending the relocation statute for the District of Columbia, Congress gave explicit recognition to this situation. H.R. Rep. No. 906, 92d Cong., 2d Sess., at 2 (1972).

The fact that utilities suffer no disproportionate injury did not escape the attention of Congress. The original version of the Uniform Relocation Act passed by the Senate (S.1) explicitly excluded from the definition of "displaced persons" utilities that had a contractual obligation to bear the

costs of relocation of facilities located under public streets. Section 105(5) stated:

> Under this paragraph the term "displaced person" shall not include the owner of personal property on the premises of another under a lease or licensing arrangement where such owner is required pursuant to such lease or license to move such property at his own expense.

S.1, 91st Cong., 1st Sess. 105(5), 115 Cong. Rec. 31372 (1969). This is a clear Congessional statement that utility companies forced to relocate facilities under public streets do not suffer the type of disproportionate harm that would entitle them to relocation benefits.

The language that passed the Senate as Section 105(5) was dropped as part of a reorganization and amendment of the bill by the Committee on Public Works of the House of Representatives. See 116 Cong. Rec. 40163 (1970) (House passage of bill as amended). The deletion of Section 105(5), however, in

no way reflected a change in the Congressional position with regard to relocation benefits for utilities. The clearest statement of the reason for the change came in the hearings before the House Committee on Public Works:

> Section 105(5). The last sentence of this subsection beginning on Line 21, page 4, provides that the term "displaced person" does not include the owner of personal property on the premises of another where the owner is required by a lease or license to move such property at his own expense. It is not clear whether this sentence is applicable to all tenants or leasees or whether this sentence is intended to remove from the definition of displaced persons the "absentee" owner of personal property. Since the purpose of the relocation assistance law is to aid tenants as well as owners, a clarification of this sentence is necessary. For example, a literal interpretation of this provision would exclude owners of mobile homes in trailer parks under lease.
>
> This language may have been included in an attempt to make public utilities occupying right-of-way by permit ineligible for moving cost payments, but it really covers many other categories of

> owners also. Moreover, this language seems completely inconsistent with the provisions in lines 13 through 20 on page 33, and lines 15 through 22 on page 38 which provides specifically for paying leasees who own buildings even though the lease requires them to move the building at no expense. In view of this ambiguity we recommend deletion of the last sentence on page 4.

Uniform Relocation Act of 1970: Hearings on S.1 and H.R. 14898 Before Comm. on Public Works of House of Reps., 91st Cong., 1st and 2d Sess. 137-38, (1970) (Statement of the Legal Affairs Committee of the American Assoc. of State Highway Officials). Section 105(5) was eliminated by the House because it was too broad. This amendment in no sense repudiated the Senate's expressed recognition of the fact that a utility company does not suffer the type of disproportionate impact necessary to qualify as a "displaced person".

Thus, Congress recognized this economic trade-off, and did not provide for a utility to be deemed a displaced person under the

additional benefits expressly provided under §4624 to persons, such as occupants of dwelling units or storekeepers, who may not qualify as entitled to supplemental benefits because no property is taken but who nevertheless pay for the right to occupy and are commonly forced to relocate as a result of urban development projects. When interpreted in light of the policies of the Act, the phrase "displaced person" clearly excludes utility companies that have suffered no taking and have been impacted only to the extent of being forced to fulfill their contractual obligations.

II. THE LEGISLATIVE HISTORY OF THE UNIFORM RELOCATION ACT SUPPORTS PETITIONER'S POSITION THAT RELOCATION BENEFITS WERE NOT INTENDED TO BE PAID TO UTILITIES.

The Court of Appeals placed great weight on the "absence of any clear legislative intent to exclude utilities", 674 F.2d at 301, and relied in addition on Congress' failure to mention utilities and on its

purported intent "to extend benefits uniformly to persons who are displaced by federal acquisitions." Id. To the contrary, however, the legislative history of and policy underlying the Uniform Relocation Act indicate that utilities were not intended to receive relocation benefits under the Act.

The legislative history of the Act demonstrates that Congress intended to extend a system of relocation assistance then being used under the Federal-Aid Highway Act of 1968, Pub. L. No. 90-495, §30, 82 Stat. 815, 830-834 (1968) (repealed 1971) and under the Housing and Urban Development Act of 1968, Pub. L. No. 90-448, 82 Stat. 476, 526 (1968) (repealed 1971) to all other federal agencies. For example, in passing the Uniform Relocation Act, Congress expressly recognized the Federal-Aid Highway Act of 1968 as a "major precedent". H.R. Rep. No. 1656, 91st Cong., 2d Sess. 2, reprinted in

[1970] U.S. Code Cong. & Ad. News 5850, 5851. In addition the Senate Report on the Uniform Relocation Act stated: "It follows as closely as possible the substantive policies of the Housing and Urban Development Act and the Federal-Aid Highway Act...." S. Rep. No. 488, 91st Cong., 1st Sess., page 2 (1969). Finally, Senator Muskie, the sponsor of the bill which became the Uniform Relocation Act, stated on the Senate floor:

> The problems created by the impact of such acquisitions have long been one of the Nation's top domestic burdens.... Much of this problem will be covered by the present relocation and acquisition programs of HUD and the new programs authorized under the Highway Act of 1968. Yet, many other agencies and programs still lack consistency as well as identity with requirements of these programs.

115 Cong. Rec. 31534 (1969). Senator Mundt added the following remarks:

> The effort to provide additional compensation was recognized by Congress when it

> approved the urban renewal legislation and more recently in the Highway Act of 1968. Our bill seeks to carry the benefit of these two statutes to all Federal and federally assisted land acquisition to provide uniformity of policy so badly needed in this area.

115 Cong. Rec. 31534. (1969).

Thus, Congress modeled the Uniform Relocation Act on the programs of relocation benefits being used on federal highway projects and HUD projects as of 1970. Significantly, neither of these programs provided relocation benefits for utilities. HUD policies unequivocally denied relocation benefits to utilities except where required by state law or other applicable contractual or legal requirements. See, HUD Urban Renewal Handbook (RHA 7209.1), supra. Similarly, the benefit program under the Federal-Aid Highway Act of 1968 did not require relocation compensation but rather allowed for reimbursement only where mandated by state laws. 23 U.S.C. §123 (1976).

Indeed, the legislative history of 23 U.S.C. §123 provides a clear indication that the program of relocation benefits under the Federal-Aid Highway Act did not grant benefits to utilities. Section 123 was originally Section 111 of the Federal-Aid Highway Act of 1956, Pub. L. No. 84-627, 70 Stat. 374, 383. Under this provision the federal government was authorized to reimburse states for 95 percent of the utility relocation costs paid by states. In response to this provision many states enacted legislation allowing the payment of relocation benefits under state law to utilities where reimbursement from the federal government was available. S. Rep. No. 1407, 85th Cong., 2d Sess., reprinted in [1958] U.S. Code Cong. and Admin. News 2383-84.

In response to this abuse, Congress amended the Federal-Aid Highways Act to make the provision of relocation benefits to

utilities by states less attractive. Federal Aid Highway Act of 1958, Pub. L. No. 85-831, 72 Stat. 89 (1958). Specifically the federal reimbursement of such costs was limited to seventy percent and such reimbursement was made available only when the state presented evidence that such relocation costs had been paid out of its own funds. S. Rep. No. 1407, 85th Cong. 2d Sess., reprinted in [1958] U.S. Code Cong. and Admin. News at 2383.

In justifying these 1958 amendments, the Senate Report stated:

> The committee did not contemplate this drastic change in existing practice when the 1956 act was enacted, and realizes that the use of Federal funds for reimbursement to the States for this purpose will increase substantially, thereby reducing the amount of Federal funds available for construction of highways.

Id. at 2382-83. Thus, Congress was clearly aware of the problems created by providing relocation benefits to utilities and sought to avoid these problems under the Federal-Aid

Highway Act by limiting the availability of such benefits to utilities.

Moreover, the Federal-Aid Highway Act utilities relocation provision, 23 U.S.C. §123, was not repealed by the Uniform Relocation Act. 84 Stat 1903 (1971); Artesian Water Co. v. State, Dept. of Highways & Trans., 330 A.2d 432 (Del. Sup. Ct. 1974), modified, 330 A.2d 441 (1974). Thus, section 123 remains as a viable statement of Congressional hostility to the payment of relocation benefits to utilities. It seems unlikely that Congress would, sub silentio, adopt a completely different policy under the Uniform Relocation Act. This is particularly true in light of the fact that one of the stated purposes of the Uniform Relocation Act was the achievement of a uniform policy for relocation assistance and real property acquisition. H.R. Rep. No.

1656, 91st Cong., 2d Sess., 3, reprinted in, [1970] U.S. Code Cong. & Ad. News 5850, 5851.

In summary, Congress enacted the Uniform Relocation Act with two systems of relocation benefits in mind. Neither of these systems created a right to compensation under federal law for utility companies. Thus, the only reasonable conclusion from the legislative history is that Congress did not intend to extend relocation compensation to utility companies by enacting the Uniform Relocation Act.

III. CONGRESSIONAL ACTION SINCE THE PASSAGE OF THE UNIFORM RELOCATION ACT SUPPORTS PETITIONER'S POSITION THAT UTILITIES ARE NOT ENTITLED TO RELOCATION BENEFITS.

In 1972 Congress amended the relocation provisions of the District of Columbia Code to provide relocation benefits to utility companies. Act of Oct. 14, 1972, Pub. L. 92-495 §2, 86 Stat. 812 (presently codified D.C. Code Ann. §5-804 (1982)). In justifying the amendment the House Report stated:

> As indicated, customers of these utilities are currently bearing these extraordinary [relocation] costs ... through the rates they pay for their utility services, despite the fact that these projects benefit the entire metropolitan community ....

H.R. Rep. No. 906, 92d Cong., 2d Sess. (1972); see, also, S. Rep. No. 1254, 92d Cong., 2d Sess. (1972). Such a justification is inconsistent with the proposition that utility companies are entitled to relocation benefits under the Uniform Relocation Act. Indeed, if utilities are entitled to relocation benefits under the Uniform Relocation Act, the District of Columbia relocation provision would largely be surplusage. Congressional action subsequent to the passage of the Uniform Relocation Act thus indicates that utilities were not intended to receive benefits under the Act.

IV. CONSTITUTIONAL CONSTRAINTS REQUIRE REVERSAL OF THE FOURTH CIRCUIT'S HOLDING IN DEFERENCE TO ESTABLISHED STATE REGULATION OF UTILITY COMPANIES.

It is clear from the language of the Uniform Relocation Act that Congress did not intend to preempt traditional areas of state sovereignty. Rather, the Act envisions voluntary compliance in that no federal assistance grants are to be approved unless the state agency provides satisfactory assurances that "fair and reasonable relocation payments shall be provided to or for displaced persons as are required to be provided by a Federal agency under sections 4622, 4623 and 4624 of this title." 42 U.S.C. §4630(1). See, 42 U.S.C. §4631, establishing the basis for federal participation in such relocation costs.

Since the passage of the Uniform Relocation Act, it has been the announced policy of HUD not to require state

authorities to forego their traditional regulatory prerogatives over utilities. Based upon this policy, states have participated in and settled federally assisted redevelopment projects. The Fourth Circuit's decision, however, brings the Uniform Relocation Act into direct conflict with contrary state contractual and regulatory policy. This is particularly true on settled projects where the state agency, such as the BRA, now must bear the brunt of unanticipated relocation costs contrary to the state policy. The effect of the Fourth Circuit's decision is to transform the Uniform Relocation Act into an instrument of federal coercion by judicial fiat and without a clear mandate from Congress that any such result was intended. Such interpretation

runs afoul of the Tenth Amendment[7] and the Contract Clause.

A. The Fourth Circuit's Holding Contravenes the Tenth Amendment.

The problems of preserving state sovereignty under the Tenth Amendment have recently been addressed by this Court in its decisions in National League of Cities v. Usery, 426 U.S. 833 (1976); Pennhurst State School & Hospital v. Halderman, 451 U.S. 1 (1981); Hodel v. Virginia Surface Mining and Reclamation Assoc., 452 U.S. 264 (1981); Federal Energy Regulatory Commission v. Mississippi, 102 S. Ct. 2126 (1982); and Equal Employment Opportunity Commission v.

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7. The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

Wyoming, 51 U.S. Law Week 4219 (March 2, 1983).

In Pennhurst, the Court summarized the existing law in these terms:

> [L]egislation enacted pursuant to the Spending Power is much in the nature of contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." See Steward Machine Co. v. Davis, 301 U.S. 548, 585-598 (1937); Harris v. McRae, 448 U.S. 297 (1980). There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

451 U.S. at 17 (citations omitted).

As in Pennhurst, there is nothing in the Act or its legislative history to suggest that Congress intended to reverse traditional

state relationships with public utilities concerning payment of relocation costs. It is only after the choice has been made by the states that this possibility emerges because of the Fourth Circuit's decision. The Fourth Circuit incorrectly presumed that the absence of a clear exclusion by Congress meant that utilities should be included. In so holding, it was misapplying the applicable standard in light of the well-established contrary state policy. Such an interpretation transgresses the line drawn by this Court between inducement and impermissible coercion which has always limited the power of Congress to impose conditions on the states by exercise of the Spending Power. Steward Machine Co. v. Davis, 301 U.S. 548, 591 (1937).[8] If

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8. National League of Cities and Hodel also speak to this situation although they addressed direct Congressional enactments under the Commerce Clause.

Congress had intended to abridge the power of the states, it had to do so clearly, not sub silentio. Without explicit Congressional

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(Footnote 8 Cont.)

> The test enunciated therein is summarized in Chief Justice Burger's dissenting opinion in Equal Employment Opportunity Commission v. Wyoming, supra:
>
> > First there must be a showing that the challenged regulation regulates the "States as States".... Second, the federal regulation must address matters that are indisputably "attributes of state sovereignty".... And, third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional functions."
>
> Id. at 4226 (citations omitted).
>
> Here, the requirement imposed, reimbursement of utility relocation costs, is a direct imposition on the States as States; the local redevelopment authorities themselves will be responsible for these costs. Because the action abrogates the States' ability to enforce their common law rights and

direction, the Court should refrain from imposing upon the states a retroactive and unknowing waiver of important contractual right.

Analogous to the case at bar are cases in the field of tax law, which have held tax obligations imposed retroactively to be an impermissible form of retroactive

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(Footnote 8 Cont.)

> to regulate their local utilities, it interferes with the States' sovereignty. In doing so, it impairs the power of state utility commissions to discharge their traditional functions: first, because state redevelopment authorities, if forced to make such relocation payments without federal reimbursement, will be threatened with bankruptcy; and second, because these agencies will no longer by able to rely on the continued validity of their contractual arrangements. Because the Fourth Circuit's reading of the HUD regulations so violates the limits National League of Cities found in the Tenth Amendment, it must be struck down.

legislation. The line drawn by this Court between permissible and impermissible tax modifications appears to be that Congress can make a statute creating a totally new type of tax effective only after the date of enactment, whereas a statute modifying an existing tax can be effective back to the date on which serious debate began concerning such modification. Estate of Ceppi v. Commissioner of Internal Revenue, Docket No. 82-1453 (1st Cir. Jan. 11, 1983). Three decisions of this Court establish this principle.

In Untermyer v. Anderson, 276 U.S. 440 (1928), this Court held that the retroactive application of a statute enacting a novel inter vivos gift tax violated due process. In Milliken v. United States, 283 U.S. 15, 21 (1931), the Court noted that the reason for the constitutional infirmity of the statute in Untermyer was that "the nature and amount

of the tax burden imposed could not have been understood and foreseen by the taxpayer at the time of the particular voluntary act which was made the occasion of the tax." The situation in Milliken was held to be different because there there was no question that the transaction would be taxed, the only question was whether a newly imposed higher tax rate would apply. Finally, in United States v. Darusmont, 449 U.S. 292 (1981), the Court held that an amendment to the so-called minimum tax provisions could be made retroactive to the beginning of the year of enactment. The Court noted that this was not a situation where the taxpayer had no idea that the transaction would be taxed at all. 449 U.S. at 300.

The Fourth Circuit's holding clearly falls under the rules of Pennhurst and Untermeyer since it reverses legal relationships that had existed for over one hundred

years. Its retroactive effect violates basic due process concerns and infringes upon prerogatives reserved for the states by the Tenth Amendment.

B. The Fourth Circuit's Ruling Constitutes an Impermissible Infringement of Contractual Obligations.

As interpreted by the Fourth Circuit, the Uniform Relocation Act constitutes an impermissible interference by the federal government with the contractual rights between utility companies and municipalities in which they operate[9] and between those

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9. The fact that in some cases the relationship between utilities and municipalities with respect to easements under public property is defined by statute or ordinance rather than a written contract does not remove those relationships from the protection of the Contract Clause because a statute is itself treated as a contract when the language and circumstances evince a legislative intent to create private rights of a contractual nature. United States Trust Co. v. New Jersey, 431 U.S. 1, 17 n. 14 (1977).

municipalities, as recipients of HUD grants, and the federal government.

Although the Contract Clause by its express terms applies only to the states, this Court in a number of decisions has held that the substance of the clause applies to the federal government through the due process provisions of the Fifth Amendment.[10] Lynch v. United States, 292 U.S. 571 (1934). The continuing vitality of the Contract Clause as an effective protection against governmental impairment of private rights is seen in this Court's recent decisions in Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978), and United States Trust Co. v. New Jersey, 431 U.S. 1 (1977).

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10. Contract rights are also subject to the Fifth Amendment's prohibition against the taking of private property for public purpose without just compensation. Cf. United States Trust Co. v. New Jersey, 431 U.S. 1, 19 n. 16 (1977).

The Spannaus case is particularly germane to the present situation. There, as here, the government retroactively sought to impose contractual liability on a private party. There the State of Minnesota retroactively required certain employers to give vested pension rights for past service where the terms of employment under which services had been rendered had not included such rights. Quite similarly here, the Act as interpreted by the Fourth Circuit would require municipalities to pay relocation costs that they were not required to pay at common law and under their contracts with utilities, and that in fact had been expressly assumed by the utilities.

In Spannaus, this Court held that such legislation was in violation of the contract clause and, therefore, unconstitutional. The Court noted that the act in question there "substantially altered" the employment

relationship "by superimposing pension obligations upon the company conspicuously beyond those that it had voluntarily agreed to undertake," 438 U.S. at 240, thereby frustrating the employer's past reliance upon its funding plan to insure the adequacy of its pension fund. By contrast, the Court noted there had been no reliance by the employees upon the benefits conferred by the statute because the statute had not existed when the services had been rendered. 438 U.S. at 246-47 and n. 18. Finally, the Court noted that the statute imposed a substantial and completely unexpected liability upon the employer.

In Spannaus, this Court concluded that the statute was impermissible under the Contract Clause. The situation here is very similar. As in Spannaus, the Act imposes substantial liabilities that either were not imposed by contract or were specifically

excluded by contract. Municipalities and redevelopment authorities have relied on these contracts in funding their projects. Conversely, the only possible reliance by the utilities could have been on the common law, franchises, and contracts, all of which excluded reimbursement for relocation expenses. Finally, as in Spannaus, the obligation imposed by the Act is both unexpected and potentially fatal, especially in this period of local tax limitations and reduced federal grants.

The Fourth Circuit's holding also fails to fall within any of the situations recognized in Spannaus as obviating the absoluteness of the prohibition imposed by the Contract Clause. Most significantly, it does not protect a basic societal interest, but rather a favored group. It does not address any specific emergency situation. And, even assuming there is an emergency, the Act is

not limited to the duration of the emergency. This is not a situation as in El Paso v. Simmons, 379 U.S. 497 (1965), where the impairment is only to peripheral aspects of the contract. The municipality's right to have utility lines relocated at no expense is the principal consideration it receives for its permitting utilities to lay their electric lines under public ways without payment for an easement. The Fourth Circuit therefore wrongfully decided the case below because its holding violates the constitutional mandates of the Contract Clause.

CONCLUSION

For all of the foregoing reasons, the decision of the Fourth Circuit should be reversed or, if affirmed, applied only to

grants made after the date of this Court's decision.

Respectfully submitted,

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Boston, Massachusetts 02110

Dated: April 2, 1983.

APPENDIX

FINANCIAL SETTLEMENT AGREEMENT

THIS AGREEMENT entered into by and between Boston Redevelopment Authority (hereinafter referred to as the "LPA"), the City of Boston (hereinafter referred to as the "City"), and the Department of Housing and Urban Development (hereinafter referred to as "HUD"), acting through the Secretary or her duly authorized agent.

WITNESSETH

WHEREAS, the LPA has entered into a Loan and Grant Contract with HUD for the undertaking of an urban renewal project, pursuant to the provisions of Title I of the Housing Act of 1949, as amended, such project identified as Project No. Mass. R-129 (hereinafter called the "Project"); and the City has entered into a Cooperation Agreement with the LPA for making available financial and other assistance for the project; and

WHEREAS, the LPA has with the concurrance of the City submitted an application for financial settlement of the Project which will result in full repayment of all temporary loans pursuant to Section 112(b) of the Housing and Community Development Act of 1974 (P. L. 93-383) and the provisions of 24 CFR Part 570, Subpart I, and such settlement under the terms of this Agreement has been approved by resolution of the governing body of the City on August 9, 1978, and

WHEREAS, the LPA has submitted a Certificate of Completion and of Gross and Net Project Cost (HUD Form 6204 and attachment) for the Project, a copy of which is attached hereto; and

WHEREAS, the LPA has submitted certification that any environmental review required by 24 CFR Section 58.20 has been completed, and that the citizen participation

requirements under 24 CFR Section 570.303 (a)(2) have been complied with; and

WHEREAS, with respect to the Project all approved project activities for which project funds are available, or noncash local grants-in-aid which would otherwise have been required, will not have been substantially completed prior to the date of the financial settlement, and such settlement will result in the use of unearned grants for the repayment of temporary loans; and

WHEREAS, the LPA, City and HUD, the parties hereto recognize and acknowledge that the requirements with respect to certain remaining obligations as herein set forth are a condition to the approval by HUD of the financial settlement;

NOW, THEREFORE, in consideration of the mutual covenants, promises, and representation contained herein, the parties hereto agree as follows:

A. The following parcels of property acquired with Project funds remain undisposed. The net proceeds from the disposition of such property after financial settlement shall be treated as program income of the City under the provisions of 24 CFR 570.506.

Parcel	Estimated Proceeds
C-1	$ 1,700
O-1	0
O-2	450
O-3	300
O-5	0
O-6	0
O-7	0
P-1A	145,000
P-1B	150,000
P-1C	240,000
P-2A	30,000
P-2B	100,000
P-3A	4,000
P-5	550
R-14	9,000
R-17	10,400
RO-1	250
RW-1	21,000
RW-2	5,000

B. The parcels referred to in (A) shall be retained for disposition by the LPA subject to the covenants specified in Section

570.801(c)(1)(i), (ii), (iii), and (iv). In the dispostion of such land, the provisions of Section 110(c)(4) of Title I of the Housing Act of 1949, as amended regarding fair use value shall not apply.

C. On displacement from any properties listed in A and B above, the displacees shall be provided with all of the benefits to which they may be entitled under the Uniform Relocation Assistance and Real Property Act of 1970. Prior to such displacement the maintenance of occupied residential properties listed above shall be substantially consistent with the property management standards which were applicable to such property prior to the financial settlement.

D. Any costs or obligations incurred in connection with the project with respect to claims which are disputed, contingent, unliquidated or unidentified, and for the payment of which insufficient project funds

have been reserved under the financial settlement, shall be borne by the City. Unearned grant funds have been reserved for the following project obligations, remaining after financial settlement:

Legal Services	$ 22,500
Survey and Planning	3,250
Acquisition Expenses	14,600
Relocation Costs	319,500
Site Clearance	8,450
Site Improvements	768,314
Real Estate Purchases	971,625

E. Subject to the provisions of F, below, the surplus grant remaining after the financial settlement of the Project, including full repayment of the Project's temporary loan, shall be applied to the repayment of temporary loans in other City of Boston Urban Renewal Projects.

F. The availability of surplus grant funds under the provision of (E) above may, at the discretion of HUD, be subject to completion of an audit and satisfaction of any audit exceptions with respect to the

project, or any other projects located in the City. Neither such surplus grant funds or other funds available under the City's Community Development Block Grant Program shall be used for payment of ineligible Project costs.

G. Special conditions, the LPA and City shall comply with any special conditions required by the Secretary of Housing and Urban Development pursuant to the preliminary request submitted under 24 CFR, Section 570.303, to which the approval of the request for financial settlement shall be subject.

H. The obligations under this Closeout Agreement are subject to the Program Management requirements of 24 CFR Part 570, Subpart J.

I. The Project plan specifies the following parcels as sites for low and moderate income housing: R-1, R-2, R-3, R-4, R-5, R-6, and R-18. To date 338 units of low

and moderate income housing have been constructed on parcels R-1 through R-6. There are no current plans to provide housing on parcel R-18. However, on a continguous parcel a school is currently being converted to low and moderate income housing which was not envisioned in the original Project plan. In sum, the Project complies with the requirements of Section 105(f) of Title I of the Housing Act of 1949, as amended and if additional housing is provided in the Project it will also comply with this requirement.

J. If any provision of this Agreement is held invalid, such holding shall not affect the validity of the remainder of the Agreement.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed and their seals to be hereunto affixed and

attested as of the 25th day of September, 1978.

(SEAL)

BOSTON REDEVELOPMENT AUTHORITY
LPA

ATTEST:

By _____
Acting Director

_____
Secretary

Approved as to form:

_____
Corporation Counsel

(SEAL)

CITY OF BOSTON

ATTEST:

By _____
Mayor

_____
City Clerk

CONCUR:
UNITED STATES OF AMERICA
SECRETARY OF HOUSING AND
URBAN DEVELOPMENT

By _____
DEPUTY AREA MANAGER